

Summary: The defendant filed a motion to dismiss the Government's garnishment proceeding. The Court denied the motion, finding that the garnishment was not barred by the ex post facto clause; that the commingling of civil and criminal actions is permitted to enforce a criminal restitution judgment; that the defendant has been afforded his due process rights; and that the defendant's claim for exemptions is not a basis for dismissal.

Case Name: USA v. Larry J. Young

Case Number: 1-07-mc-9/1-90-cr-8

Docket Number: 38

Date Filed: 5/1/08

Nature of Suit:

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

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|---------------------------|---|----------------------------------|
| United States of America, |) | |
| |) | |
| Plaintiff, |) | ORDER DENYING DEFENDANT'S |
| |) | MOTION TO DISMISS |
| vs. |) | |
| |) | |
| Larry J. Young, |) | Case No. 1:07-MC-09/1:90-CR-08 |
| |) | |
| Defendant. |) | |

Before the Court is the Defendant's "Motion to Dismiss" filed on March 24, 2008. See Docket No. 30. The Government filed a response on April 22, 2008. See Docket No. 36. The Defendant filed a reply on April 30, 2008. See Docket No. 37. The Court denies the Defendant's motion for the reasons set forth below.

I. BACKGROUND

On September 12, 1990, a criminal judgment was entered against the defendant, Larry J. Young, convicting Young of filing false tax returns and requiring him to pay a \$300.00 special

assessment and \$54,000.00 in restitution. The Government contends that since the criminal judgment was entered seventeen years ago, Young has not made any voluntary payments to satisfy the debt. On January 25, 2008, the Government commenced a garnishment proceeding against Young because he had failed to make any payments toward his restitution. See Docket No. 6. In preparation for the garnishment hearing, the Government was informed that the Internal Revenue Service (IRS) had offset Young's past tax returns and applied them to Young's restitution amount. To date, the IRS has offset Young's restitution amount by \$6,939.30. Therefore, the Government now seeks to garnish \$47,060.70.

Young moves the Court "for a total dismissal of the proceeding until such time as all the requirements for due process have been complied with, with an award of costs; expenses; and fees to be awarded to Larry J. Young for the time and work involved in responding to the intent of the proceeding." See Docket No. 30. Young contends that the garnishment proceeding should be dismissed because of the Government's "attempt to utilize an ex post facto act;" the "blurring and confusion caused by the mixing of civil and criminal jurisdictions;" and the "failure of the government to comply with any of the requirements of due process throughout the proceedings." See Docket No. 30. Young has also invoked "all the benefits and provisions of Title 26 USCS § 151, absolutely exempting the amount of \$3,400.00." See Docket No. 30.

The Government contends that the ex post facto clause is not a bar to garnishment in this action; that the Government is not required to initiate a separate civil proceeding to enforce the restitution judgment against Young; that Young was afforded due process; and that Young's claim for exemptions should be denied. See Docket No. 36.

II. LEGAL DISCUSSION

The Federal Debt Collection Procedures Act of 1990 (FDCPA), codified in 28 U.S.C. §§ 3001-3308, establishes the “exclusive civil procedures for the United States . . . to recover a judgment on . . . an amount that is owing to the United States on account of . . . restitution.” 28 U.S.C. §§ 3001(a)(1), 3002(3)(B). The FDCPA was enacted “to give the Justice Department uniform Federal procedures – prejudgment remedies and postjudgment remedies – to collect debts owed the United States nationwide.” United States v. Mays, 430 F.3d 963, 965 (9th Cir. 2005) (quoting H.R.Rep. No. 103-883, at 81 (1995)). The FDCPA provides that a “court may issue a writ of garnishment . . . in order to satisfy the judgment against the debtor.” 28 U.S.C. § 3205.

A. EX POST FACTO

On September 12, 1990, a criminal judgment was entered against Young, ordering him to pay \$54,000.00 in restitution. On January 25, 2008, the Government, pursuant to 28 U.S.C. § 3205(b)(1), applied for a writ of continuing garnishment against Young, seeking to garnish the sum of \$54,000.00. See Docket No. 6. This amount has subsequently been lowered to \$47,060.70. See Docket No. 36. Young contends that 28 U.S.C. § 3205 did not become effective until May 1991, which was after the date of his criminal judgment. Young contends that the “attempt to utilize [28 U.S.C. § 3205] for a matter that occurred earlier raises the issue of an ex post facto act being utilized in this matter” and that “the North Dakota Constitution prohibits the passing of an ex post facto law, and thereby also the attempted use of an ex post facto act for any purpose.” See Docket No. 31. The Government contends that the Ex Post Facto Clause does not bar collection of the restitution owed.

“The ex post facto clause is violated when a law defining a crime or increasing punishment for a crime is applied to events that occurred before its enactment, to the ‘disadvantage’ of the offender.” United States v. Carter, 490 F.3d 641, 643 (8th Cir. 2007) (internal citations omitted). The Government contends that the Fair Debt Collection Procedures Act, of which 28 U.S.C. § 3205 is a section, “neither altered the definition of the criminal conduct for which Young was convicted, nor increased the punishment for his crimes. It simply provided the United States with a uniform statutory scheme to enforce restitution orders on behalf of victims of crime.” See Docket No. 36. In United States v. Phillips, 303 F.3d 548, 551 (5th Cir. 2002), the appellant argued that applying the Mandatory Victims Restitution Act (MVRA) to criminal acts before its effective date violated the ex post facto clause. The Fifth Circuit disagreed, holding that the MVRA “merely affects how appellant’s punishment is collected; it does not increase appellant’s punishment.” Id. (citing Creel v. Kyle, 42 F.3d 955, 958 (5th Cir. 1995) (holding that “procedural changes, even if they work to the disadvantage of a criminal defendant, do not violate the Ex Post Facto Clause.”)).

Young was convicted of filing false tax returns. It is clear that the Fair Debt Collection Procedures Act does not alter the definition of the crime of filing false tax returns nor does it increase the punishment associated with that criminal offense. Instead, the Fair Debt Collection Procedures Act (28 U.S.C. § 3205) sets forth the procedural requirements for garnishment and provides a uniform statutory scheme to enforce restitution orders on behalf of victims of crime. 28 U.S.C. § 3205 merely affects how Young’s punishment is to be collected. Therefore, the Court finds that the Ex Post Facto Clause does not apply and is not a basis to dismiss the garnishment proceeding.

B. MIXING OF CIVIL AND CRIMINAL JURISDICTIONS

Young contends that this action must be dismissed for a lack of jurisdiction because the Government has commingled civil jurisdiction with criminal jurisdiction, thus resulting in a violation of his due process rights. Young contends that the Government has taken “a section encoded in Title 28 USCS, Title 28 USCS § 3205, into an alleged criminal case, and trying to choose, pick, and mismatch the intent, provisions, and reasons for the Constitutional divide of the jurisdictions.” See Docket No. 31. The Government contends that it may enforce, through a civil action, a judgment imposing a criminal monetary penalty under 28 U.S.C. § 3205.

It is well-established that “district courts may entertain civil garnishment and other collection proceedings as postjudgment remedies within an underlying criminal case; nothing precludes the government from initiating a collection proceeding under an existing criminal docket number in order to collect a fine or restitution ordered as part of the criminal sentence.” United States v. Kollintzas, 501 F.3d 796, 800-01 (7th Cir. 2007) (citing United States v. Vitek Supply Corp., 151 F.3d 580, 585-86 (7th Cir. 1998) (holding the government may proceed against a corporate defendant’s alter egos as a post-judgment remedy in a criminal case to collect the restitution obligations of individual and corporate defendants); United States v. Mays, 430 F.3d 963, 966 (9th Cir. 2005) (holding FDCPA procedures are available as post-judgment remedies in criminal cases); United States v. Timilty, 148 F.3d 1, 3 (1st Cir. 1998) (holding the government need not reduce a restitution order to a civil judgment prior to enforcing it; the government may proceed with the collection action within a criminal case); United States v. Thornton, 672 F.2d 101, 106 (D.C. Cir. 1982) (stating that is not necessary for the Government to start a new civil or criminal action to proceed with a garnishment)).

The Court finds that the use of a civil garnishment proceeding within a criminal case is permitted under the Fair Debt Collection Procedures Act, and the “commingling” of civil and criminal actions is not a basis for dismissal of the garnishment proceeding. It is well-established that the Government is not required to initiate a separate civil proceeding in order to enforce a criminal restitution judgment.

C. DUE PROCESS

Young also contends that he has not been afforded due process. However, Young has not provided any factual or legal basis for the claim that there has been a lack of due process beyond a bald assertion and a basic description of the concept. See Docket No. 31. The Government contends that Young has been afforded due process based on the following: “demand for payment was made at the time of sentencing and not less than eight times since then;” “the United States has also provided Young with credit for overpayments recognized by the IRS, and the correct balance due and owing on his debt;” and “the United States arranged for personal service of the garnishment writ as required by § 3205(c).” See Docket No. 36. In essence, the Government contends that Young has received due process – notice and an opportunity to be heard on his claims.

On January 25, 2008, the Government filed an Application for Writ of Continuing Garnishment pursuant to the procedures set forth under 28 U.S.C. §§ 3205(b) and (c). See Docket No. 6. As required under 28 U.S.C. § 3205(b)(1)(B), “demand for payment of the above-stated debt

was made upon the debtor not less than 30 days prior to January 23, 2008, and debtor has failed to satisfy the debt.” See Docket Nos. 6, 36-2. In fact, demand for payment was made at the time of sentencing and not less than eight times since then. See Docket No. 36-2. With its brief in opposition to Young’s motion to dismiss and the attached affidavits, the Government has also provided Young with credit for overpayments recognized by the IRS, and the correct balance due and owing on his debt. See Docket No. 36-3; 28 U.S.C. § 3205(b)(1)(B). In addition, the Government arranged for personal service of the garnishment writ as required by 28 U.S.C. § 3205(c). Accordingly, the Government complied with the procedural requirements of the statute.

Young has been granted the opportunity to claim exemptions and make objections to the garnishment proceeding, and he has taken advantage of such opportunities by filing a number of submissions. A garnishment hearing has been requested by Young and, after the Court conducts a hearing, Young will have received all the process he is due in the context of a garnishment proceeding under federal law.

To the extent that Young is contending that the original amount of restitution ordered in the criminal case from 1990 is incorrect – which he appears to claim in his affidavit (Docket No. 32) – that argument is expressly rejected. The time period to challenge the restitution ordered in the original criminal judgment has long expired. That challenge should have been pursued back in 1990 – not seventeen years later. On February 14, 2008, this Court issued an “Order Granting Motion to Limit Garnishment Hearing” which outlined the limited issues that will be addressed at the garnishment hearing. See Docket No. 17. It is clear and well-established that Young may not challenge the validity of the underlying criminal conviction or restitution obligation during a

garnishment hearing. United States v. Pugh, 75 Fed. Appx. 546, 2003 WL 22048360 at *1 (8th Cir. 2003); United States v. Taylor, 2007 WL 87746 *2 (W.D.N.C. Jan. 9, 2007). The Court finds that the unsupported, broad allegation of a violation of Young's due process rights is not a basis for dismissal of the garnishment proceeding.

D. ABSOLUTE EXEMPTION

Finally, Young contends that he is entitled to an "absolute exemption" pursuant to 26 U.S.C. § 151 of at least \$3,400.00. Section 151 of the Internal Revenue Code allows for deductions in computing taxable income. 26 U.S.C. § 151(a). Young does not raise this exemption issue as a basis for the motion to dismiss. Instead, he is merely seeking an additional exemption to be applied in the garnishment proceeding. Young has already filed a "Claim for Exemption Form" pursuant to 18 U.S.C. § 3613. See Docket No. 8-2. On that form, Young claimed certain exemptions from enforcement. The "Claim for Exemption Form" is the proper avenue by which Young may pursue exemptions.

III. CONCLUSION

For the reasons set forth above, the Court **DENIES** the Defendant's Motion to Dismiss (Docket No. 30).

IT IS SO ORDERED.

Dated this 1st day of May, 2008.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court